84-400

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ALEXANDER L. STEVAS,
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No._____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

UNITED STATES OF AMERICA,
Respondent,

VS.

MARVIN L. WINNETT,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jurisdictional Statement,
Petition for Writ of Certiorari,
and Appendix

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QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERR IN UPHOLDING THE RULING OF THE UNITED STATES DISTRICT COURT THAT A DEFENDANT IN A CRIMINAL CASE CANNOT RELY ON THE DEFENSE OF ENTRAPMENT UNLESS THE DEFENDANT ADMITS ALL ELEMENTS OF THE CRIME?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Marvin Winnett, respectfully prays that this court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit filed April 11, 1984, in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto (App. A) and the Order on the petition to rehear is in the Appendix (App. B).

JURISDICTION OF THE UNITED STATES SUPREME COURT

The United States Court of Appeals for the Sixth Circuit rendered its opinion in this matter on April 11, 1984, and Petitioner filed a timely petition for rehearing with the suggestion for rehearing **en banc.** On July 9, 1984, the Court of Appeals denied the petition for rehearing. This Petition for Writ of Certiorari is timely filed based on the date of the denial of the petition for rehearing.

Jurisdiction is conferred on the court by 28 U.S.C. § 1254(1), this being a petition of the defendant-appellant after the rendition of the judgment of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following Constitutional provisions and statutes are involved in this case.

UNITED STATES CONSTITUTION, AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, TITLE 18, APPENDIX § 1202

§ 1202. Receipt, possession, or transportation of firearms

(a) Persons liable; penalties for violations. Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act [enacted June 19, 1968], any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(b) Employment; persons liable; penalties for violations. Any individual who to his knowledge and while being employed by any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who, in the course of such employment, receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act

[enacted June 19, 1968], any firearm shall be fined not more than $10,000 or imprisoned for not more than two year, or both.

(c) Definitions. As used in this title [18 USCS Appx. §§ 1201 et seq]—

(1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

(3) "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifly, or shotgun;

(4) "destructive device" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in diameter;

(5) "handgun" means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand;

(6) "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed

shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger;
(7) "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

STATEMENT OF THE CASE

Petitioner Marvin L. Winnett was indicted on March 9, 1983, in a one-count indictment for the violation of 18, U.S.C. App., §1202(a) (1) charging that he possessed a firearm which had moved in interstate commerce being a convicted felon at the time.

A jury trial commenced on June 28, 1983, before the Honorable C.G. Neese with a verdict of guilty being returned by the jury on June 29, 1983.

Briefs for both parties were filed in the United States Court of Appeals for the Sixth Circuit and oral argument was heard by a three-judge panel of that court on March 16, 1984. On April 11, 1984, the court filed its opinion upholding the ruling of the District Court that the defendant was not entitled to a charge to the jury on the defense of entrapment because he had not admitted all elements of the crime with which he was charged. A petition to rehear with a suggestion for a hearing **en banc** was filed and on July 9, 1984, that petition was denied.

The Petitioner has now timely filed his Petition for Writ of Certiorari with this honorable court.

INITIAL BASIS FOR FEDERAL JURISDICTION

The initial basis for Federal jurisdiction is the fact that the defendant was charged with violation of a Federal

criminal statute, namely 18 U.S.C. App.§ 1202(a)(1). The indictment alleged that Mr. Winnett having previously been convicted of a felony did unlawfully possess a firearm which had previously been transported in interstate commerce.

ARGUMENT

THE COURT SHOULD GRANT THIS PETITION BECAUSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN **UNITED STATES V. DEMMA,** 523 F.2d 981 (9th Cir. 1975).

In the District Court, the defendant admitted two elements of the crime of possession of a firearm that had traveled in interstate commerce by a convicted felon but he denied the element of possession. Additionally, the defendant requested that the jury be charged on the defense of entrapment based upon the Government's admissions in direct testimony that law enforcement officials were trying to connect the defendant "in some criminal activity." (Appendix A-1) The District Court declined to charge on the theory of entrapment; thus, the appeal to the Court of Appeals for the Sixth Circuit resulted.

In its opinion (Appendix A-1), the Sixth Circuit acknowledged that there is a conflict in the circuits on whether or not a defendant may deny an element of the crime and avail himself of the defense of entrapment. The court stated that a contrary view of entrapment is followed in the Ninth Circuit which does not require the defendant to admit all the substantive elements of the crime before invoking the defense of entrapment.

> A contrary view of entrapment, which has been embraced by the Ninth Circuit, does not require the defendant's admission of the substantive elements of the crime as a prerequisite to invoking the defense. The Ninth Circuit justified its position with the analysis that an admission of the offense as a condition precedent to invoking the defense of entrapment infringes the defendant's constitutional right to remain silent, and relieves the Government of its burden to prove guilt beyond a reasonable doubt. **See e.g., United States v Demma,** 523 F.2d 981 (9th Cir. 1975).

In contrast to the ruling in **Demma, supra,** the Sixth Circuit stated its adherence to the "traditional" approach which requires the defendant to admit all elements of the crime before availing himself of the defense of entrapment.

> The Sixth Circuit adheres to the "traditional" approach to the defense of entrapment, which mandates the defendant to admit "each and every element of the crime" before availing himself of the defense. **United States v. Bryant,** 716 F.2d 1091 (6th Cir. 1983); **United States v. Mitchell,** 514 F.2d 758 (6th Cir. 1975). The traditional rule is followed in the First, Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits. **See e.g., United States v. Annese,** 631 F.2d 1041 (1st Cir. 1980); **United States v. Shoup,** 608 F.2d 950 (3rd Cir. 1979); **United States v. Brooks,** 611 F.2d 614 (5th Cir. 1980); **United States v. Mitchell,** 514 F.2d 758 (6th Cir.) **cert. denied,** 432 U.S. 847 (1975); **United States v. Garcia,** 562 F.2d 411 (7th Cir. 1977); **Ware v. United States,** 259 F.2d 442 (8th Cir. 1958); **Rowlette v. United States,** 392 F.2d 437 (10th Cir. 1968).

Regardless of the approach taken by the Sixth Circuit and other circuits in this area, it must be conceded that a contrary view does exist in the Ninth Circuit. It is clear

that criminal defendants in circuits other than the Ninth Circuit are at a distinct disadvantage as compared to those whose cases arise in the Ninth Circuit. The petitioner argued in the Sixth Circuit that the Ninth Circuit rule should be adopted but the court declined. (Appendix A-1)

> "Alternatively, defendant suggests that the rule adopted in the Ninth Circuit, i.e., that the crime need not be admitted before the defense of entrapment becomes available, is the better rule and should be adopted by this circuit. This court declines the invitation to overrule Sixth Circuit precedent on this issue. To the contrary, this court reaffirms the "traditional" rule."

The Petitioner respectfully submits that the conflict between the circuits should be resolved and that it should be resolved in favor of the Ninth Circuit rule.

In **United States v. Demma,** the court was quite explicit in its holding.

> "We now set the circuit's entrapment law in order by holding that a defendant may assert entrapment without being required to concede that he committed the crime charged or any of its elements."
> **United States v. Demma**, 523 F.2d 981, 982

In support of its ruling, the court reasoned as follows:

> "It is well established that a defendant in a criminal prosecution may assert inconsistent defenses. The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the Government's opportunities for invoking the criminal sanction.
> **United States v. Demma,** 523 F.2d 981, 985

The question of whether or not an accused may deny an element or elements of the crime and also rely on an entrapment defense has reached the level that it is the topic of an annotation in Annot., 54 A.L.R. Fed 644 entitled **"Availability in Federal Court of Defense of Entrapment Where Accused Denies Committing Acts Which Constitute Offense Charged."** That annotation collects cases on both sides of the issue and clearly outlines the conflicts in the circuits.

Interestingly, the A.L.R. annotation places the Sixth Circuit in the group that does not allow the use of the entrapment defense without admitting all elements of the crime but the article points to two cases in which even the Sixth Circuit indicated an approval of the inconsistent defenses. The cases are **Scribner v. United States**, 4 F.2d 97 (6th Cir. 1925) and **United States v. Baker**, 373 F.2d 28 (6th Cir. 1967). Admittedly, these cases predate the cases of **United States v. Bryant**, 716 F.2d 1091 (6th Cir. 1983) and **United States v. Mitchell**, 514 F.2d 758 (6th Cir. 1975) but these latter cases have never specifically overruled the holdings in **Scribner** and **Baker, supra.**

In the **Baker** case, the court reversed and remanded because the District Court failed to charge entrapment when the defendant denied an element of the offense and stated as follows:

> "We do not think that in this circuit the arguable inconsistence between defendant's first and second defenses at trial rules out submission of both to the jury. (Citations omitted) 373 F.2d 28-30.

It is, therefore, Petitioner's respectful insistence that even the Sixth Circuit has adhered to the rule allowing the inconsistent defenses; therefore, there is not only a conflict among the circuits but there is also a conflict within the circuit in which the case arose.

CONCLUSION

The Petitioner submits that there is an undeniable conflict between the rule in the Ninth Circuit, the Sixth Circuit, and other circuits as to whether or not a defendant may avail himself of the defense of entrapment without admitting all elements of the crime. Additionally, there even appears to be a conflict within the Sixth Circuit over the proper rule and there are numerous variations of the rule to be found in other circuits, all of which create a degree of confusion and disparity which mandates this court's attention and correction.

It is Petitioner's position that the Ninth Circuit rule should be adopted by this honorable court and made uniform throughout the country. Further, Petitioner believes that this Petition for Writ of Certiorari should be granted and that the matter should be reversed and remanded for a new trial with instruction to the court to charge on the defense of entrapment.

Respectfully submitted,

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APPENDIX A

No. 83-5575
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	ON APPEAL
Plaintiff-Appellee	)	FROM THE
	)	UNITED STATES
v.	)	DISTRICT
	)	COURT FOR
MARVIN L. WINNETT,	)	THE MIDDLE
	)	DISTRICT OF
Defendant-Appellant	)	TENNESSEE

Decided and filed_____

BEFORE: ENGEL and KRUPANSKY, Circuit Judges; and WEICK Senior Circuit Judge

PER CURIAM. Defendant Marvin L. Winnett appealed from his jury conviction on one count of violating 18 U.S.C. app. §1202(a)(1) (1979), which prohibits convicted felons from possessing a firearm which has traveled in interstate commerce. Defendant predicated his challenge on the theory that the trial judge erred in failing to instruct the jury on the defense of entrapment.

Prior to trial Winnett stipulated that the firearm in question had traveled in interstate commerce and that he was a convicted felon. Evidence adduced at trial centered on the issue of whether Winnett ever had actual possession of the weapon. Conflicting accounts of the incident leading to Winnett's indictment were presented by three witnesses at trial: Lucien Debow, a friend of the defendant who apparently became a police informant in exchange for reduction of criminal charges pending against him

unrelated to the Winnett matter; Donald Watson, an agent of the department of Alcohol, Tobacco and Firearms (ATF) who allegedly bought the gun from Winnett; and Winnett himself, who consistently denied possession of the firearm in question.

Debow testified that he had agreed to introduce federal law enforcement officers to Winnett in exchange for the reduction of state charges pending against him for receiving and concealing stolen property to a lesser criminal offense.[1] Debow further testified that about a month after he had agreed to this arrangement, Winnett contacted him and solicited Debow's assistance in selling a handgun. Debow consented and Winnett brought the gun to Debow's apartment and left it with him.

Debow recounted that, subsequent to receiving the handgun from Winnett, he contacted federal authorities, and that ATF Agent Watson came to Debow's apartment and took possession of the revolver. Debow said he then called Winnett and told him that he had a prospective buyer for the gun who would be at a designated automobile auction the next day at which time Debow would introduce Winnett to the purchaser. Winnett agreed and the introduction of Winnett and Watson proceeded as planned. Debow said he had no further involvement in the transaction.

Agent Watson testified that he was equipped with a voice transmitter and recorder at the auction. After meeting Winnett, the pair proceeded to Watson's car, where Watson displayed several weapons to Winnett, including the handgun in question, to create the impression that he was a gun dealer.

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[1] The record does not disclose the specific reason that the federal authorities wanted to contact Winnett. Agent Watson testified in general terms that the federal and city law enforcement officials were trying to connect the defendant "in some criminal activity".

Watson testified that before he displayed the gun here in issue, Winnett had described certain of its physical characteristics, and requested the return of the "sock" in which the gun was wrapped. Winnett advised Watson that he wouldn't have any problems with the revolver because it "had come from the desk of an old fellow" in either Bowling Green or Franklin, Kentucky, and that the owner rarely looked in the desk and "wouldn't miss it anyway."[2] Watson stated that Winnett accepted $100 for the gun.

Winnett's version of the incident, which the jury apparently did not find credible, was that Debow was the original possessor of the gun, and that Winnett only acted as the broker in the transaction between Debow and Watson as a favor to Debow. Winnett repeatedly testified that he never had possession of the gun, and that the first occasion when he saw the weapon was at the time Watson removed it from the trunk of Watson's car. Winnett also denied the statements attributed to him on Watson's tape recording as the statements related to the origin and characteristics of the gun.

At the conclusion of the evidence, defendant's counsel requested a jury instruction on the defense of entrapment. The trial court denied this request, and the jury found defendant guilty. Defendant initiated this appeal, charging that the denial of the entrapment instruction constituted reversible error.

The Sixth Circuit adheres to the "traditional" approach to the defense of entrapment, which mandates

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[2] Some of the statements attributed to the defendant by Watson regarding the gun were transcribed from Watson's tape recording of the incident. The prosecutor acknowledged that the tape was of extremely poor quality because of the background noise at the auction. The transcribed sections of the tape were admitted into evidence, but a copy of same was not provided to this court.

the defendant to admit "each and every element of the crime" before availing himself of the defense. **United States v. Bryant,** 716 F.2d 1091 (6th Cir. 1983); **United States v. Mitchell,** 514 F.2d 758 (6th Cir. 1975). The traditional rule is followed in the First, Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits. **See e.g., United States v. Annese,** 631 F.2d 1041 (1st Cir. 1980); **United States v. Shoup,** 608 F.2d 950 (3rd Cir. 1979); **United States v. Brooks,** 611 F.2d 614 (5th Cir. 1980); **United States v. Mitchell,** 514 F.2d 758 (6th Cir.) **cert. denied,** 432 U.S. 847 (1975); **United States v. Garcia,** 562 F.2d 411 (7th Cir. 1977); **Ware v. United States,** 259 F.2d 442 (8th Cir. 1958); **Rowlette v. United States,** 392 F.2d 437 (10th Cir. 1968).

A contrary view of entrapment, which has been embraced by the Ninth Circuit, does not require the defandant's admission of the substantive elements of the crime as a prerequisite to invoking the defense. The Ninth Circuit justified its position with the analysis that an admission of the offense as a condition precedent to invoking the defense of entrapment infringes the defendant's constitutional right to remain silent, and relieves the Government of its burden to prove guilt beyond a reasonable doubt. **See e.g., United States v. Demma,** 523 F.2d 981 (9th Cir. 1975).

Defendant in the case at bar first argues that his pretrial stipulations admitting his previous felony conviction and that the gun had traveled in interstate commerce satisfied the conditional requirements of key elements of the crime essential to justify the imposition of the entrapment defense. This argument clearly ignores the mandate of **Bryant** and **Mithcell,** both **supra,** which require that defendant admit "each and every element" of the crime with which he is charged as a condition to invoking the entrapment defense. Possession of a firearm is the key element for a conviction under 18 U.S.C. app. §1202(a)

(1), which element of the crime the defendant repeatedly denied. Therefore, his argument is simply without merit.

Alternatively, defendant suggests that the rule adopted in the Ninth Circuit, i.e., that the crime need not be admitted before the defense of entrapment becomes available, is the better rule and should be adopted by this circuit. This court declines the invitation to overrule Sixth Circuit precedent on this issue. To the contrary, this court reaffirms the "traditional" rule.

Apart from the assignment of error predicated upon the trial court's refusal to instruct the jury on the entrapment defense, a review of the record in its entirety makes it readily apparent that the jury completely discredited the defendant's own testimony. To the contrary, the jury's ultimate resolution of the case evinces its decision to place greater weight upon the testimony of the prosecutor's witnesses in concluding that the government had met its burden of proof, beyond a reasonable doubt, that the defendant had possession of the gun prior to the involvement of Debow and Watson in the scheme.

In sum, the defendant was not entitled to an instruction on the defense of entrapment due to his repeated denial of the crime. We find no reason to overrule Sixth Circuit precedent to arrive at the opposite result.

The decision of the district court is AFFIRMED.

APPENDIX B

No. 83-5575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**ORDER**
	)	
v.	)	
MARVIN WINNETT,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: ENGEL and KRUPANSKY, Circuit Judges; and Weick, Senior Circuit Judge

PER CURIAM. No active member of the court having requested **en banc** review of the above captioned case, the petition for rehearing has been referred to this panel for consideration. As it appears that the panel misapprehended no issue of law or fact in the original disposition of the cause, the petition for rehearing is denied.

IT IS SO ORDERED

_____

Clerk

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CLERK

No. 84-400

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARVIN L. WINNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-400

MARVIN L. WINNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entitled to a jury instruction on the defense of entrapment.

1. Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to 18 months' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A1-A5).

The evidence at trial is summarized in the court of appeals' opinion (Pet. App. A2-A3). In early 1982, Lucian Debow, a retired policeman and acquaintance of petitioner, agreed to introduce federal law enforcement authorities to petitioner in exchange for reduction of state charges pending against him for receiving and concealing stolen property. Debow testified that shortly thereafter, on about March 1, petitioner telephoned Debow and asked for Debow's assistance in selling a handgun. Debow consented and

petitioner brought the gun — a .44 caliber Smith and Wesson revolver contained in a sock — to Debow's apartment and left it with him. Debow then contacted the authorities and, within the next day or two, ATF Agent Don Watson went to Debow's apartment and took possession of the gun. Debow then contacted petitioner and told him that he had a prospective buyer for petitioner's gun. Debow said he would introduce the buyer to petitioner at an automobile auction in Nashville. Pet. App. A1; Tr. 15-16, 50-56.

At the auction, Debow introduced Agent Watson to petitioner, telling him that Watson was interested in buying and selling guns. In a partially recorded conversation,[1] petitioner described certain characteristics of the revolver in question to Agent Watson, including the fact that it was an antique, and stated that he wanted $100 for it. He also asked Watson to return the sock in which the revolver had been wrapped. In addition, petitioner said that Watson would not have any problem disposing of the revolver in the Nashville area because it "had come from the desk of an old fellow" in Kentucky who rarely looked in the desk and "wouldn't miss it anyway." Pet. App. A3; Tr. 23-24, 30-31. Watson also opened the trunk of his car and displayed several weapons to petitioner, including the revolver in question, to create the impression that he was in fact a gun dealer. Petitioner then accepted a payment of $100 from Watson for the revolver. Tr. 23-25.[2]

Petitioner testified at trial that Debow was the possessor of the gun, that Debow had asked him to pretend that it belonged to him and to sell it to Watson for $100, and that he never had possession of the gun. Petitioner also claimed

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[1]Portions of the recording were of poor quality (Pet. App. A3 n.2).

[2]The parties stipulated that, as alleged in the indictment, petitioner was a convicted felon and the gun in issue had travelled in interstate commerce (Tr. 9).

that the only reason he had been able to discuss the gun's antique character and the fact that it was wrapped in a sock was that Debow had given him that information. Petitioner denied that he made the other statements about the gun that were attributed to him by Watson, even though some of those statements appeared on the transcript of the recording of the conversation. Tr. 64-73. Debow, Watson, and petitioner were the only witnesses at the trial.

2. On closing argument to the jury, defense counsel attempted for the first time to raise an entrapment defense. He was interrupted by the district court, however. The court observed (Tr. 96-97; emphasis added):

> Now, under these circumstances, you can't defend on entrapment, not in view of the testimony of the defendant.
>
> * * * * *
>
> [Y]ou have not made any request for entrapment. *There has been no evidence of entrapment*, and the defendant has denied the crime and the law is very clear on that.

The district court later overruled petitioner's objection to the omission of an entrapment instruction from the court's charge to the jury (Tr. 123).

The court of appeals rejected petitioner's contention that the denial of an entrapment instruction constituted reversible error. First, the court noted that the Sixth Circuit "adheres to the 'traditional' approach to the defense of entrapment, which mandates the defendant to admit 'each and every element of the crime' before availing himself of the defense." Pet. App. A3-A4, quoting *United States* v. *Bryant*, 716 F.2d 1091, 1094 (6th Cir. 1983), cert. denied, No. 83-5697 (Jan. 23, 1984). The court declined petitioner's "invitation to overrule Sixth Circuit precedent on this

issue" and "reaffirm[ed] the 'traditional' rule" (Pet. App. A5). But the court of appeals also stated that "a review of the record in its entirety makes it readily apparent that the jury completely discredited [petitioner's] own testimony. * * * The jury's ultimate resolution of the case evinces its decision to place greater weight upon the testimony of the prosecutor's witnesses in concluding that the government had met its burden of proof, beyond a reasonable doubt, that [petitioner] *had possession of the gun prior to the involvement of Debow and Watson in the scheme*" (*ibid.*; emphasis added).

3. There is no merit to petitioner's contention (Pet. 6-9) that this Court should review the decision below to resolve an asserted conflict among the circuits regarding the availability of the entrapment defense. As the court of appeals explained (Pet. App. A4), the majority of the circuits follow the Sixth Circuit in holding that a defendant must ordinarily admit commission of the offense charged before he is entitled to an entrapment instruction. See *ibid.* (citing cases). See also *United States* v. *Smith*, 629 F.2d 650, 652-653 (10th Cir.), cert. denied, 449 U.S. 994 (1980).[3] Petitioner asserts (Pet. 6-8) that in *United States* v. *Demma*, 523 F.2d 981 (1975) (en banc), the Ninth Circuit adopted a different position. See also *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc).

But even if this conflict exists, petitioner is not entitled to relief, because he could not have obtained an entrapment instruction even in a circuit that disagrees with the Sixth

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[3]Cf. *United States* v. *Haimowitz*, 725 F.2d 1561 (11th Cir. 1984) (the general rule requiring the defendant to admit commission of the offense applies, unless the government's own case contains substantial evidence of entrapment); *United States* v. *Garrett*, 716 F.2d 257 (5th Cir. 1983), cert. denied, No. 83-1226 (Apr. 16, 1984) (general rule applies at least when the proof of entrapment is contrary or repugnant to proof that the defendant is otherwise not guilty).

Circuit's approach. The settled principle, even in the circuits in which petitioner asserts that he would have fared better, is that a "defendant is not entitled to have the issue of entrapment submitted to the jury in the absence of evidence showing some inducement by a government agent *and* a lack of predisposition by the defendant." *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), cert. denied, No. 83-5661 (Dec. 5, 1983) (emphasis in original); see, *e.g.*, *United States* v. *Brooks*, 567 F.2d 134, 138 (D.C. Cir. 1977); *United States* v. *Buckley*, 586 F.2d 498, 501 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *United States* v. *DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). In this case, as the district court expressly stated (Tr. 96), there was "no evidence of entrapment." Petitioner testified that he never had possession of the gun; he offered no evidence tending to show that Debow or Watson induced him to take possession of it.

Moreover, as the court of appeals noted, the jury's verdict makes it clear that the jury would have rejected an entrapment defense in any event. Petitioner testified that he never possessed the weapon and merely acted as if he was the owner, at Debow's request; Debow testified that petitioner possessed the weapon before Debow and Watson became involved in the scheme at all. In convicting petitioner, the jury must have rejected his version of the events and chosen Debow's. Since petitioner could not possibly have been entrapped if he had already possessed the weapon before Debow and Watson became involved, the jury would necessarily have rejected an entrapment defense as well. Because petitioner would not be entitled to relief even in a circuit that did not require a defendant to admit the crime in order

to obtain an entrapment instruction, this case presents no occasion for this Court to resolve the asserted conflict.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

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[4]Petitioner also argues (Pet. 9) that the holding in this case and in the other recent Sixth Circuit decisions cited in the court of appeals' opinion (Pet. App. A4) conflicts with two earlier Sixth Circuit cases. The fact remains that the decision below is in accord with the long-standing Sixth Circuit rule and, in any event, the asserted intra-circuit conflict does not warrant the attention of this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

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